United States Supreme Court.

No. 324

October Term, 1921.

W. H. PHIPPS, AND W. H. PHIPPS AS DIRECTOR OF THE DEPARTMENT OF COMMERCE OF THE STATE OF OHIO,

Appellant,

vs.

THE CLEVELAND REFINING COMPANY OF CLEVELAND, OHIO,

Appellee.

BRIEF OF APPELLANT.

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Special Counsel.

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United States Supreme Court.

No. 865.

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W. H. PHIPPS, AND W. H. PHIPPS AS DIRECTOR OF THE DEPARTMENT OF COMMERCE OF THE STATE OF OHIO,

Appellant,

vs.

THE CLEVELAND REFINING COMPANY OF CLEVELAND, OHIO,

Appellee.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

This cause comes here on appeal under Section 266 of the Judicial Code (1243 U. S. R.) from the decree of

a special tribunal provided for in said section and composed of Hon. Maurice H. Donahue, United States circuit judge, Hon. John E. Sater, district judge, and Hon. John W. Peck, district judge, sitting at Columbus, Ohio, in the United States District Court for the Eastern Division, Southern District of Ohio. The decree appealed from was a decree for an interlocutory injunction, restraining the appellant, W. H. Phipps, as director of commerce of the State of Ohio, from enforcing the major part of an act of the general assembly of Ohio entitled "An Act to provide for the inspection of petroleum, illuminating oils, gasoline and naptha and the repeal of Sections 844 and 868, inclusive, of the General Code," filed in said District Court on February 9, 1922. In the District Court the appellee was the plaintiff and the appellant was defendant, and in the statement of the case in the District Court will be referred to in that capacity.

In its bill of complaint in equity the plaintiff, reciting that it was a corporation organized under the laws of Ohio, with its principal place of business in East Cleveland, Ohio, stated that it was engaged in the manufacture and sale of petroleum and its products; that the defendant, W. H. Phipps, was the director of the department of commerce of the State of Ohio and as such director charged with the duty and clothed with the power of enforcing the laws of the State of Ohio with reference to the inspection of petroleum and its products.

On or about the nineteenth day of May, 1915, the general assembly of Ohio passed the act above referred to, providing for the inspection of petroleum and its prod-

ucts, said act being numbered in the General Code of the State of Ohio as Sections 844 to 868, inclusive. It is found in Vol. 106, Ohio Session Laws, page 309.

Said complaint recited that the plaintiff was engaged in buying and shipping into the State of Ohio from other states of the United States large quantities of petroleum products, in tank cars, bartels, cans and other packages, and has contracts and arrangements for such goods which it is bound to and can only consummate through its established business without great loss to itself and deprivation and inconvenience to the public. The plaintiff complained of numerous constitutional defects in this act. See pages 4, et seq. of the record herein. However, the principal complaint was that the act was repugnant to the provisions of Article 1, Section 10, Clause 2, of the constitution of the United States, forbidding states from laying imposts without the consent of congress upon interstate commerce, except such as may be absolutely necessary for the execution of inspection laws. It also claimed that the act violated Section 1, Article 8, giving to congress the power to regulate commerce among the several states. Although as stated there were other objections, these two specifically noted were the principal objections relied upon by the plaintiff and were the ones upon which the special tribunal founded their decree for the interlocutory injunction herein. (See page 81 of the Record.)

In the complaint the plaintiff set out in detail for years the total receipts, disbursements and resultant revenue to the State of Ohio of the act in question for five years

beginning July 1, 1915, and ending July 1, 1920. The totals of these were as follows:

Receipts	$639,057.47
Disbursements	321,188.68
Revenue	317,868.79
Outstanding accounts	65,385.34

The defendant, director of the department of commerce, filed an answer where, among other things, he admitted that the statement of receipts, disbursements and net revenue resulting from the inspection, as above referred to, was substantially correct. He said further, however, that no part of said net revenue was derived or did accumulate from inspections and fees thereon in interstate shipments; that such interstate shipments required inspection at destination or place of delivery thereof, entailing and requiring a greater expenditure of time and money than intrastate inspections and that the cost of making such interstate inspections was equal to and greater than the fee collected therefor. Whatever net revenue or profit resulted came solely and entirely from intrastate shipments and that the interstate inspections resulted in a loss to the state.

The defendant denied that the act was an abuse of the police power of the state or of the power of taxation as it related to intrastate business and did not burden interstate commerce or lay any impost or duty thereon beyond an inspection fee absolutely necessary for its execution. (See page 15 of Record.)

The special tribunal, composed as aforesaid, however, found that the law in its application to the two classes of

commerce above referred to was not separable and that the inspection fees prescribed by the statute were beyond the cost of legitimate inspection, and by necessary operation unduly burdened and obstructed the freedom of interstate commerce, and as such commerce could not be separated from the intrastate shipments, the whole tax was void. (See 83 of the Record.)

Our assignment of error in appeal from the decree of said special tribunal present the questions involved here. They are:

"1. The inspection fees required to be collected from the plaintiff, and those similarly situated, by the act of the legislature of the state of Ohio, of which complaint is herein made, are not greater than the reasonable expense necessary for the inspection of kerosene, gasoline and petroleum products shipped or transported into the state of Ohio in interstate business; that although the cost of inspecting intrastate shipments of such kerosene, gasoline and other petroleum products is not as great as the inspection fees collected therefor in the practical operation of said act, the cost of inspecting such interstate shipments is greater than the amount of inspection fees charged and collected therefor and said special tribunal erred in holding to the contrary.

2. In the practical enforcement and operation of said act as interpreted and administered by the officials of said state of Ohio, it was possible and practical to separately consider and determine the fees and cost of inspecting such kerosene, gasoline and petroleum products shipped in interstate commerce, compared with the inspection fee charged for such inspection, apart and distinguishable from the fees and cost of the inspection of such products in intrastate business compared with the fees charged therefor; that the official records of such inspec-

tions are and have been kept in such form and manner that such comparative cost of inspection in each of said kinds of shipment may be considered and separately determined; so that said act in practical operation is separable in its relation to and effect upon interstate commerce and said special tribunal erred in holding to the contrary."

These assignments are reducible to these propositions:

1. The state's cost of interstate inspection is greater than the fees charged therefor.

2. In practical administration the comparative cost of interstate inspection is ascertainable as distinguished from the cost of intrastate inspection.

The Ohio oil inspection law being of general application to both of these propositions, a brief analysis of it, with the general rule as to the proper presumption, may properly precede their separate discussion.

THE OHIO OIL INSPECTION LAW.

The present act was passed in 1915 and is Sections 844 to 868 of the General Code of Ohio. The first two Sections, 844 and 845, relate to the appointment and qualification of a state inspector of oils. These two sections have been qualified by Section 154-39, General Code of Ohio, and known as the Ohio Administrative Code, being found in 109 O. L., 117, to the extent that the director of the department of commerce is given the power and charged with the duty of carrying out the oil inspection law in the place of the state inspector of oils, as originally provided for. By Section 846 it is made the duty

of the defendant "to inspect all illuminating oils offered for sale within the state, for consummation therein, as hereinafter provided in this act." Sections 847, 847-1 and 848 prescribe the duties of deputy inspectors. Section 849 is as follows:

> "For inspections under the provisions of this chapter, each deputy inspector of oils shall receive a fee of three cents for each barrel of oil, of fifty gallons, inspected by him, and his actual and necessary traveling expenses incurred while engaged in the discharge of the duties of his office. Such compensation and expenses shall be paid from the fees collected under the provisions of the next following section, but no deputy inspector shall receive more than twelve hundred dollars nor less than seven hundred and twenty dollars in any year in addition to his expenses."

Section 850 is as follows:

> "Each owner of oil inspected under this chapter shall pay the state for inspection the following fees:
>
> For a single barrel, package or cask, twenty-five cents.
>
> When the lot inspected does not exceed ten barrels of fifty gallons each in the aggregate, for each barrel, fifteen cents.
>
> When the lot inspected does not exceed fifty barrels of fifty gallons each in the aggregate, for each barrel, ten cents.
>
> When the lot inspected exceeds fifty barrels of fifty gallons each in the aggregate, for each barrel, three cents.
>
> All fees under this chapter shall be payable on demand of the treasurer of state and in no case shall payment thereof be deferred beyond the tenth of the next month after the inspection is made, and such fees shall be a lien on the oil so inspected."

Sections 857 and 852 require a record and monthl
port of inspections to be made, the former providing
the state inspector, now director of commerce, "
keep a record of oils inspected, showing the date
spection, number of barrels, and the name of the p
for whom inspected, which shall be open to examin
by all persons interested."

Section 852, relating to the monthly report of d
inspectors, is as follows:

> "On the first day of each month, each deput
> spector of oils shall make return to the state insp
> of all inspections made during the preceding m
> Such return shall show the quantity inspected,
> of inspection and the name of the person for w
> inspected. At the same time he shall file a dupl
> copy of such return with the auditor of state.
> fees received or collected by a deputy inspector
> be transmitted immediately to the state inspec

Section 854 requires all illuminating fluids or
stances, the product of petroleum, or into which p
leum or its products enter, whether manufactured w
this state or not, to be inspected before being offere
sale within this state.

Sections 855, 856, 857 and 858 contain directions f
spection, the flashing test for illuminating oil and p
sion for testing apparatus and for duties relative t
test of oils.

Section 859 prohibits the sale of rejected oils, pr
ing a penalty for such sale, while Section 860 requi
certificate of inspection to be attached to a car whe
spected in the car. Section 861 prohibits the sale
jected oil from tank cars.

Sections 862, 863 and 864 provide regulations for the sale and delivery of oil from wagons, containers and tank lines and are practical regulations not especially important to the question involved. Section 865, relating to the inspection of gasoline, is as follows:

> "Gasoline, petroleum-ether or similar or like substances, under whatever name called, whether manufactured within this state or not, having a lower flash test than provided in this chapter for illuminating oils, shall be inspected by the state inspector of oils. Upon inspection, the state inspector shall affix by stamp or stencil to the package containing such substance a printed inscription containing its commercial name, the word 'dangerous,' date of inspection and the name and official designation of the officer making the inspection. **For such inspections, the state inspector shall receive the same fees as for the inspection of oils, which shall be paid into the state treasury, as herein provided for other fees.** Such fees shall be a lien on the gasoline, petroleum-ether or similar substance so inspected. For such inspection, deputy inspectors shall receive the same fees and shall make monthly report of such inspections, as provided herein for the inspection of oils. Whoever sells or offers for sale any gasoline, petroleum, ether, or similar or like substance not stamped as provided in this chapter shall be fined not more than one thousand dollars or imprisoned, in the county jail not exceeding twenty days or both."

The next section, 866, makes the provisions relating to oil inspection apply " so far as practicable" to the inspection of gasoline and similar substances. Section 867 is an exemption statute as follows:

> "No provision of this chapter shall require the inspection of miners' lamp-oil, paraffine wax, fuel oil for fuel purposes under boilers for generating steam,

> furnaces or retorts in place of other fuel in manufacturing plants, or gas-making material when sold to gas works for manufacture of gas."

Sections 868, 869 and 870 relate to the inquisitorial power of the inspector and the responsibility and civil liability of dealers in case of the selling or offering for sale of uninspected products and for willful sale for illuminating purposes of oil below the required test. The last section, 871, prohibits the inspector from trafficking in oils and provides the reference of disputes between the inspector and manufacturer or dealer.

PRESUMPTIONS.

This court in Western Union Telegraph Co. v. New Hope, 187 U. S., 417, held that "prima facie the charge for inspection in an act otherwise constitutional is reasonable."

Another decision of this court in Red "C" Oil Co. vs. Board of Agriculture, 222 U. S., 380, 392, forecloses any question as to oil inspection being a proper exercise of the police power.

> "The conceded fact that in thirty-five states of the union oil inspection laws are in force is sufficient to adversely dispose of the first of these question."

This court in the case of Hall vs. Geiger Jones, 242 U. S., 537, has declared that as to official acts the presumption is that:

> "It is to be presumed that the executive officer will act properly in the public interest and not wantonly or arbitrarily."

In a more recent case, Standard Oil Company vs. Graves, 249 U. S., 389, it is settled that:

> "The construction of a state statute must be judged by its necessary effect; the name is not conclusive."

See also Pure Oil Company vs. Minn., 248 U. S., 158.

THE STATES COST OF INTERSTATE INSPECTION IS GREATER THAN THE FEES CHARGED THEREFOR.

This is purely a question of fact which on appeal in this kind of a case is reviewable in this court.

In this case an answer was filed. See page 12 of the record. Consistent with the practice in the District Court, evidence was also introduced in the hearing of the application for the interlocutory injunction. The only evidence introduced was the deposition of W. H. Phipps, director of the Department of Commerce of Ohio. This deposition is found in the record beginning at page 16. Mr. Phipps had formerly been state oil inspector and under Section 155 was and still is director of the Department of Commerce of Ohio. The testimony of Mr. Phipps, at pages 16 and 17, shows that he, by practical experience and observation, was well qualified to furnish definite and reliable expert evidence on the practical operation of the law. His testimony is entirely uncontradicted. It shows that aside from his previous practical experience, upon the filing of the petition in this case he made a thorough and exhaustive analysis of the comparative profit or revenue derived from interstate and intrastate

inspections. He took from original records typical or representative inspections in all of the districts of the state of a sufficient number to indicate a fair average. His method in ascertaining the facts and the source of such facts are found on pages 17, 18 and 20 of the record.

He was asked this question with reference to the abstracts submitted:

> "Q. You may state whether or not, from your experience and observation in the work of official inspection of petroleum products, those are representative of the inspections generally throughout the state. A. They are." (Pp. 21 and 22, record.)

As shown at page 22, record, he was asked:

> "Q. State if, from your previous experience in such matters, and from such examination as you have made from the records and from such other facts of which you have personal knowledge, you are able to state whether or not the cost of inspecting interstate shipments is greater than the fees collected therefor? A. I am.
>
> Judge Chamberlin: I object.
>
> Q. Mr. Phipps, independent of those memoranda, I want you to state, from your experience above mentioned, the cost of interstate inspections compared with the fees collected therefor.
>
> * * * (Objection.)
>
> A. Interstate inspection, in so far as expenses of those inspections are concerned, shows that the fees received for those inspections are considerably less than the cost of the inspections and that as a net sum it would result in the loss to the state of several thousands of dollars."

On cross-examination, at page 27, record, Mr. Phipps was asked this question:

> "Q. Is it possible for you and your deputies to absolutely determine the inspections of interstate and intrastate transactions? A. Yes, absolutely."

And at page 28:

> "Q. If all of the oil were inspected at the refineries of the state, and there was no interstate shipments of oil to inspect— A. I could do it that way with five inspectors.
>
> Q. And the cost of inspection would be very much less? A. Very much less if there were no interstate shipments."

At page 29 of the record, without quoting a number of preliminary questions, which the court will undoubtedly read, Mr. Phipps was asked these last two questions:

> "Q. State whether or not in your judgment interstate inspection has resulted in a profit to the state from the time that the inspectors were put on a separate salary? A. I don't think the inspection of interstate shipments into Ohio ever at any time showed a profit to the state.
>
> Q. I don't know whether you understood my former question or not, but I want now to ask you if the records to which you have referred, and from which these so-called abstracts were made, are original and official records? A. They are."

Exhibit "A," at page 30 of the record, shows the seventeen inspection districts with their respective inspectors. Exhibits 1 to 17 inclusive, at pages 31 to 52 of the record, are abstracts taken from the reports of the inspectors from the seventeen districts, showing representative or typical inspections made in each of said districts, with

the amount of fees charged and the cost of such inspe
tion, and a gain or loss as the case may be.

Exhibits 17a and 18, on pages 53 and 54 of the recor
are additional abstracts representing interstate inspe
tions chosen from different parts of the state in car lo
inspections. In Exhibit 18 is a comparative table sho
ing the difference in cost between local inspections a
inspections requiring traveling expense. Attached
Exhibits 17 and 17a were original cards of notification
the oil inspector by the shipper, the method of which
referred to by Mr. Phipps in his testimony on cro
examination in the first answer on page 24 of the reco
The record of these cards attached to the exhibits
ferred to is at pages 58 to 78, inclusive. On each ca
are the figures showing the inspection fees charged. T
follows each copy of the card as it appears at the pag
indicated.

The deposition in this case was taken at the order
the court with very little time left for the preparati
of an analysis of the various reports, and it was aft
ward noted that no summary was made of the abstra
by districts. Hence to facilitate the consideration of
Phipps' analysis, such district abstracts are summariz
as follows:

	Total Fees	Total Cost	Net Lo
District No. 1....	$ 43.20	$ 85.92	$ 42.
District No. 2....	38.40	60.89	22.
District No. 2....	9.85	18.83	8
District No. 3....	91.20	253.11	161.
District No. 4....	58.50	64.04	5.

District No. 5....	81.60	130.99	49.39
District No. 6....	86.40	146.10	59.70
District No. 7....	62.40	174.12	111.72
District No. 8....	120.60	286.82	146.82
District No. 9....	115.20	202.19	86.99
District No. 10....	57.60	100.15	42.55
District No. 11....	76.80	126.05	49.25
District No. 12....	90.00	91.09	.09
District No. 13....	91.20	136.38	45.18
District No. 14....	91.20	167.70	86.50
District No. 15....	57.50	124.22	66.62
District No. 16....	43.20	124.81	81.61
District No. 17....	91.20	195.60	104.40
	$1305.45	$2490.01	$1184.56

Total net loss on typical inspections on interstate shipments taken, as indicated, from all the districts of the state.....$1184.56

In the light of this evidence we say it has been definitely and positively shown that whatever may be the result as to interstate inspections, no profit has accrued to the state from interstate inspection. So far as questions arising under Sections 8 and 10, Article 1 of the United States constitution, relating to interstate commerce, this is decisive. The only showing that the amount of fees fixed by this law is in excess of the reasonable amount necessary for the enforcement of the inspection of interstate commerce is the general allegation in the complaint admitted in the answer that the revenue derived from all inspections for five years amounts to $317,868.79, not including outstanding accounts. This allegation relates

to inspections generally. At the threshold it is met with the positive and direct allegation in the answer of the defendant that "no part of said net revenue was derived or did accumulate from inspections and fees thereon * *. Said net revenue and profit resulted solely and entirely from purely intrastate shipments and that the inspection of interstate shipments resulted in a loss to the state." (See page 15, Record.)

These allegations in the answer are so clearly shown by uncontradicted testimony that there is no escape from the conclusion that the expense of interstate inspection exceeds the fees charged. Whatever **presumption** of profit on interstate inspection arises from the general result of the law is completely overcome by **facts** relating specially to interstate inspection. It is special facts opposed to **presumption.** In such a case the plaintiff was bound to meet and disprove our evidence before it was entitled to judgment below.

IN PRACTICAL ADMINISTRATION THE COMPARATIVE COST OF INTERSTATE INSPECTION IS ASCERTAINABLE AS DISTINGUISHED FROM THE COST OF INTRASTATE INSPECTION.

Much of what has been said on the first proposition is applicable here. At this point attention may be directed to the memorandum opinion of the Special Tribunal which made the order complained of here. It begins at page 78 of the Record. We believe that the Special Tribunal did not quite fully understand the state's contention in this case in this, that regardless of whether the

law could or should be interpreted as providing for separate records of the cost of inspection of the two classes of shipments, if it could not be shown that the cost of inspection of interstate shipments was greater than the fees collected for that kind of inspection, as provided by law, then the law was not in conflict with the commerce clauses of the federal constitution. It is true that we insisted that in the practical enforcement and administration of the law it was possible to determine the relative cost of interstate inspections as distinguished from such cost on intrastate inspections. At page 84 of the opinion the special tribunal said:

> "We are asked in construing the Ohio law not only to view the impost with respect of two classes separately, but also to separate and apportion between them the expense of inspection, collection and administration, and, having done so, to test the constitutionality of each by the result thus obtained, and to uphold the charge on interstate commerce as reasonable and that upon intrastate commerce as a combined inspection fee and excise tax."

What we did insist upon was that so far as the commerce clauses of the federal constitution are concerned, the cost of the interstate inspections, compared with the fee charged therefor, was the only thing necessary to determine. It makes no difference whether the act is severable or not if the interstate inspection fees are not greater than the cost of inspection.

The special tribunal further said:

> "The act makes no such separation of cost, nor does it afford any means for so doing. Were we to adopt the defendant's contention, we would be com-

> pelled to prescribe rules for the division of costs and to assume that the general assembly intended to levy on intrastate commerce a tax as well as an inspection fee; but this is not permissible, for the reason that in the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used. Gould v. Gould, 245 U. S., 151, 153."

It is true that the law does not explicitly provide for any distinction in the records to be kept by the director of commerce as to the two classes of shipments. However, Section 851, supra, does require a record of the inspection to be kept and since the passage of the administrative code, above referred to, the defendant director of the department of commerce has power to prescribe regulations not inconsistent with law "for the government of his department, the conduct of its employes, the performance of its business and the custody, use and preservation of the records, papers, books, documents and property pertaining thereto." See Section 150-8, General Code of Ohio, as enacted in 109 O. L., page 107. This power is in addition to the powers conferred by the oil inspection law directly. We submit that while the act makes no provision for such separation of cost, in its grant of power to the director of the department of commerce it does afford means for so doing and the holding to the contrary by the special tribunal was erroneous. But it is essential to a clear understanding of the state's position that it is now made clear that under the federal constitutional commerce clauses, the sole subject of inquiry is the comparison of interstate inspection fee with

cost. Whether or not there is a profit on intrastate inspection is of no consequence in this phase of the case. The comparison of the cost of the two classes of inspections is competent only to account for the net profit of all inspections.

This court, in the case of Ratterman vs. Western Union Company, 127 U. S., 411, 32 Law Ed., 229, held that a single state tax on receipts derived partly from interstate and partly from intrastate commerce and returned and assessed in gross, without separation or apportionment, so far as levied upon receipts derived from interstate commerce, was void, but so far as levied upon receipts from intrastate commerce it was valid.

In the Standard Oil case, supra, 249 U. S., 289, it is held that "the construction of a state statute must be judged by its necessary effect; the name is not conclusive."

It is true that in the case of Castle v. Mason, 91 O. S., 296, 304, it was held that this law, prior to its amendment, was unconstitutional in that the inspection fee was unreasonably greater than the cost of inspection and that the law violated the commerce clauses above referred to. However, immediately following the decision in that case the legislature amended the law and reduced the inspection fee fifty per cent. The only question of separate consideration was as to gasoline and oils which is not applicable to the present case.

The question presented in this case, however, was not presented to or considered by the Supreme Court of Ohio in that case, but it is logical to conclude that had the

evidence shown as clearly as it shows here that the cost of inspecting interstate shipments was greater than the fee charged therefor, the decision of the Supreme Court of Ohio in that case would have been different. It is apparent that the sole reason of the Supreme Court of Ohio for declaring the law unconstitutional was the preponderance of fee over cost with no allegation or evidence as in the present case. See the opinion of the court at page 307.

> "We are, therefore, constrained to hold that the inspection act necessarily operates and imposes a burden upon commerce from other states and that in so far as the same affects such commerce it violates the federal constitution and is unconstitutional and void **for the reason that it imposes a burden upon such commerce largely in excess of the expense necessary for inspection.**"

This law was immediately amended after this decision. The fee was reduced fifty per cent. The evidence conclusively shows that interstate fees do not exceed cost of inspection.

We believe that what this court said in Bowman, Attorney General, vs. Continental Oil Co., decided June 6, 1921, in U. S. Advance Opinions, 1920-1921, pages 720, 721, is applicable. In that case the court said of the excise tax of the State of New Mexico that the

> "divisible nature of the subject renders it feasable to control the operation and effect of the tax so as to prevent it being imposed upon sales in interstate commerce, while allowing the state to enforce it with respect to domestic transactions; and with the allowance of injunction limited accordingly, plaintiff will receive the full protection to which it is entitled under the constitution of the United States."

While this case is not directly in point, as the New Mexico law was purely a taxation measure, comprehending a license fee upon all distributors and retailers of gasoline and an excise tax per gallon upon the sale and use of gasoline, the license tax being incapable of severability was held to be void and the excise tax was sustained as applied to intrastate commerce. This is different from the law in Ohio which is a police measure in its principal objects. But this holding in the New Mexico case does show that notwithstanding the lack of explicit direction or requirement in the law, if it is so administered that interstate commerce is not burdened beyond the reasonable cost for the enforcement of inspection laws those engaged in interstate commerce are receiving the protection to which they are entitled under the constitution.

We submit that we are not confronted with the question of divisibility of the law or divisibility of application, or in fact with any question of divisibility. The only question is as to reasonableness of inspection fees for interstate inspections. The only suggestion of divisibility arises in determining whether the cost of interstate inspections is ascertainable. Does not this narrow our case down to this: Is it possible to determine the actual cost of interstate inspections? This is a practical question. It is moreover a question of fact. The evidence is all one way. Those charged with enforcement of this law have spoken. They say that this cost is ascertainable and that it is greater than the fees collected. This evidence is not denied in any way. It was ignored by the

special tribunal which was mislead in the application of the rule of this court, where questions of divisibility of law in its relation to the two kinds of commerce were involved. We submit that the reasons given in the memorandum opinion of the special tribunal for ignoring this evidence are insufficient; it ignores the substance and gets lost in the shadow. The object of the commerce clauses is to prevent the imposition of imposts or taxes, controlling, regulating or hindering interstate commerce by states, except such fees as are reasonably necessary for the execution of the state's inspection law. If it is possible to shew that such inspection fees do not exceed the cost of inspection, and such fact is shown clearly, how can it be claimed that the commerce provisions are violated. Is it any answer to this fact, which contains the whole equity, to say that the law makes no provision for separate apportionment or ascertainment of the cost of the two kinds of inspections? We conceive it to be within the power, duty and traditions of this court, in reconciling and maintaining the balance of federal and state powers, to protect and guard the one as jealously as the other. Hence, before striking down a state statute this court is anxious to know how the act actually affects the complainant, or, as Mr. Justice Hughes, speaking for this court in Standard Stock Food Co. v. Wright, 225 U. S. 540, 551, said:

> "One who would strike down a state statute as violative of the federal constitution, must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law **injures him and so operates** as to deprive him of rights protected by the federal constitution."

ISSUES UNDER STATE CONSTITUTION.

It is probable that the reference in the memorandum opinion of the special tribunal in this case to questions raised under the state constitution should be considered in this brief.

We submit that under the decisions of the Supreme Court of Ohio, in the cases of State ex rel. v. Carrel, 99 O. S., 220, and in Saviers vs. Smith, 101 O. S., 132, the act in question is not defective.

The first syllabus, also the holding of the state court in the case of Castle vs. Mason, supra, where the earlier inspection law was held invalid, was held to be not repugnant to the state constitution. See first syllabus. Of course the construction of a state statute by the Supreme Court of the state, as to its conformity to the state constitution, is binding and conclusive upon this court. That there is no valid objection to an ordinance because it is both a regulation and a tax law, has been settled by this court in Gundling v. Chicago, 177 U. S., 188, where it is said:

> "It is not a valid objection to an ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorizes it fulfills the two functions, one a regulating and the other a revenue function."

The constitutional question is not what form the law takes or on what theory it originated, but had the legislature power to enact it? Or, as expressed in the Marmet case, page 70:

> "Whether the authority to enact laws of the character of the one in question shall be regarded as based upon the police power of the government, or upon the taxing power, is, perhaps, not of the greatest importance, provided the power is found to exist. We have the best of authority for the oft-repeated aphorism that 'there is no magic in names.'"

CONCLUSION.

In the light of the evidence before the special tribunal, we submit (1) that it is clear that there is no excess charged or collected from interstate inspection over and above the reasonable cost of inspection; (2) in the practical administration of the Ohio oil inspection law it is possible to ascertain the comparative cost of interstate inspections as distinguished from the cost of intrastate inspection.

Consistent with these conclusions we therefore submit that the order and judgment below should be reversed or modified and remanded for further proceedings.

Respectfully submitted,

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